IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No.391 of 1993.

Dated of Decision: November 6, 2007.

State of H.P. ..... Appellant.

Versus

Mohan Lal. ..... Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting? Yes.

For the Appellant : Mr. S. D. Vasudeva, Addl. Advocate General.

For the Respondent : Mr. Ashok Kumar Thakur, Advocate.

Surjit Singh, J (oral):

This appeal by the State is directed against the judgment of Sessions Court, whereby the respondent, who was charged with an offence under Section 376 of the Indian Penal Code, has been acquitted.

Case of the prosecution may be summed up thus. The prosecutrix (PW4), aged about six years, used to live with her maternal grand parents and was a student of Ist Class, at the time of commission of the crime. The date of commission of crime is 18.1.1993. On that date, she had gone to the school. While returning home, around 4.30 p.m., she walked along the path that passes in front of the shop of the respondent. The respondent allured the prosecutrix by offering a candy and took her inside the shop. Then he stripped naked the lower part of her body and also took off his own pant and seated her in his lap. He then forced his male organ into her vagina. This resulted in the bleeding from her vagina. The

Whether reporters of local papers may be allowed to see the judgment?

girl started crying. The respondent then released her. The girl put on her Pajami and proceeded towards her house crying. On the way, at the village well, her Massi (PW5) Veena Devi met her. On being asked the cause of her crying and the appearance of the blood on her Pajami, she narrated the entire incident to her. Her Massi took her to her house, i.e. the house of her (Massi's) father's house. There again the girl narrated the incident to her maternal grandfather Krishan Gopal (PW6). She was immediately taken to the police station by PW6 Krishan Gopal, her grandfather, where FIR Ext.PD was lodged. The girl was got medically examined. PW1 Dr. Manju Mittal, who conducted the medico legal examination on 18th January, 1993 itself, around 7.30 p.m., found presence of dried blood on the thighs and knees of the girl. She also found that the hymen was absent and mucus membrane of posterior vaginal wall was torn. The vagina on examination started bleeding. Secretion from posterior fornix of vagina was collected and slides were prepared. The same were sent to the Chemical Examiner, who found no spermatozoa therein. The doctor, based on the report of the Chemical Examiner, gave the opinion that it was difficult to say whether rape had been committed or not, but vaginal injuries were there. The police took into possession Pajami Ext.P1 of the prosecutrix. The accused was arrested and got medically examined on 21st January, 1993 from Dr. K.K. Rattan (PW2). Doctor opined that the respondent was capable for performing the sexual intercourse, though he did not notice any evidence of recent intercourse by him. He noticed the presence of smegma under the prepuce.

During the course of trial, prosecution examined 14 witnesses. They included PW1 Dr. Manju Mittal, who conducted the medico

legal examination of the prosecutrix, PW2 Dr.K.K. Rattan, who medically examined the respondent, PW4, the prosecutrix herself, PW5 Ms. Veena Devi, Massi of the prosecutrix, PW6 Krishan Gopal, the maternal grandfather of the prosecutrix, PW8 Jia Lal and PW9 Prithi Chand, in whose presence the underwear of the respondent was taken into possession and PW14 Niranjan Singh, Sub Inspector of the Police, who conducted the investigation of the case. Accused denied that he had committed any act of sexual assault on the prosecutrix and stated that he had been falsely implicated at the instance of two persons by the names of Hem Raj and Ram Kishan, who had earlier also tried to implicate him in a case of rape.

The trial court acquitted the respondent holding that prosecutrix, per her own deposition, had been tutored to depose against the respondent, there was no definite evidence that the prosecutrix had been raped, it was not proved that the underwear Ext.P2 on which blood and semen were found was in fact of that of the respondent and that in the past, too an attempt had been made by two persons, named Ram Kishan and Hem Raj to falsely implicate the respondent in a rape case, which rendered the explanation of the respondent that he was sought to be falsely implicated in this case also, at the instance of aforesaid two persons, plausible.

We have heard the learned Additional Advocate General and the learned counsel for the respondent and gone through the record.

The trial court recorded the statement of the prosecutrix, after questioning the prosecutrix on the point whether she understood sanctity of truth and recording its satisfaction that she was capable of understanding the things and also understood the sanctity of the

truth. The prosecutrix, in no uncertain terms testified that when she was returning home from the school and passed in front of the shop of the respondent, the latter called her to the shop and gave her a piece of candy and then removed her Pajami and also put off his pant and then seated her in his lap and force-entered his male organ into her vagina, upon which she started crying. She also stated that her vagina started bleeding and then the respondent released her. She stated that thereafter she proceeded towards her Nana's house and on the way her Massi met her at the village well and when she asked her the cause of her crying she told her that she had been raped by the respondent. She has also stated that she was taken by her Massi to her grandfather's house and there again she narrated the entire incident to her Nana also. She stated that she was then taken to the police station. No suggestion was put to the prosecutrix in the course of her cross-examination that the narration of the incident given by her in the court was untrue. It is correct that suggestions were given to her that she was being tutored repeatedly by her Massi and Nana and also by the police officials who came to deliver the summons, for the last 4-5 days as to what facts she was to state in the court and she admitted suggestions to be correct, but, as already stated, no suggestion was given to her that what she had stated in the court was incorrect or that no such thing as testified by her had happened. As a matter of fact, the testimony of the prosecutrix is corroborated not only by the testimony of her Massi PW5 Veena Devi and PW6 Krishan Gopal, her grandfather, but also by the medico legal evidence in the form of testimony of PW1 Dr. Manju Mittal and the medico legal report Ext.PA issued by her and the fact that the prosecutrix had been bleeding per vagina and her

Pajami Ext.P1 was stained with blood. FIR Ext.PD also corroborates her version.

In view of the categorical statement of the prosecutrix, which is corroborated by the aforesaid evidence, facts and circumstances, the view taken by the trial court that the prosecutrix is not to be believed, on account of her having been tutored, is perverse.

No doubt PW1 Dr. Manju Mittal opined that it was difficult to say that the rape had been committed or not, but a careful perusal of her testimony shows that she opined so because of the absence of the spermatozoa in the vaginal secretion, the slide of which was prepared and sent to the Chemical Examiner. It is now well settled that mere absence of the spermatozoa is no ground to disbelieve the evidence of the prosecutrix with regard to penetration itself. PW1 Dr. Manju Mittal has stated that the possibility of the spermatozoa or the semen having been washed away when the prosecutrix went walking to Nana's house after the occurrence, can not be ruled out. There may be another reason for the absence of the semen in the vaginal secretion of the prosecutrix, the slide of which was examined by the Chemical Examiner. It has come in the testimony of the prosecutrix that when the respondent force-entered his male organ into her vagina, she started crying and the respondent then released her. May be that when the prosecutrix started crying, the respondent got panicky and withdrew his male organ from the vagina of the prosecutrix, before ejaculation, and that is why no spermatozoa was there in the vaginal secretion.

Observation of the trial court that the underwear Ext.P2 on which blood and semen were found has not been proved to be that of the respondent or in any case it is not proved that he was wearing

that very underwear at the time of alleged incident, is of little consequence, even if it be assumed to be true, when the testimony of the prosecutrix inspires confidence and not only that it is corroborated by other independent evidence, as noticed hereinabove.

View taken by the trial court that the explanation of respondent that he has been falsely implicated at the instance of two persons named Ram Kishan and Hem Raj is plausible, is also perverse. There is absolutely no evidence on the record indicating that said Ram Kishan and Hem Raj have any relationship or friendship with the Nana of the prosecutrix. Moreover, the Nana of the prosecutrix would not have staked the honour of the prosecutrix by falsely implicating the respondent at the instance of said Ram Kishan and Hem Raj even if they be assumed to be known to him. The trial court has taken this view on the basis of the testimony of a witness examined by the prosecution, namely Ramesh Chand (PW7). The witness has stated that once about two years back, the mother of the respondent accompanied by one Harjas visited him and told him that her son (the respondent) was being beaten up by the people of village Maniala and that he should accompany them to that village. He stated that he went to the village Maniala accompanied by Ram Kishan, the father of the respondent and found that the respondent had been caught hold by the people and was being beaten up and his face had been blackened and that when he asked Pradhan Hem Raj who was also there as to why the respondent was being beaten up, he told that he had raped a girl of their village, but the parents of that girl did not want to lodge any report with the police, to save the girl from infamy and so the people decided to punish the respondent

at their own level. The testimony of this witness in no way suggests that Pradhan Hem Raj or the other man named Ram Kishan had any axe to grind by getting the respondent beaten up and getting his face blackened in the earlier case or to falsely implicate in the present case. As a matter of fact, the testimony of the witness shows that the respondent is habitual of molesting the girls.

The trial court has also observed in its judgment that the prosecutrix is a child of only six years and therefore, her testimony cannot be accepted unless corroborated. In support of this view, the trial court has relied upon a judgment of the Punjab & Haryana High Court in **Ram Singh** v. **The State,** [1973, Chandigarh Law Reporter, 482] and another of the Hon'ble Supreme Court in **State of Assam** v. **Muffizuddin Ahmed**,[1983 Cr. App. Reports 129]. Both the cases relied upon by the trial court pertain to offence punishable, under Section 302 of the Indian Penal Code, in which the children were examined as eye witnesses. In the present case, the child witness herself is a victim of the rape and her testimony is corroborated by the medico legal evidence, as discussed hereinabove, besides being corroborated by the testimony of her Massi (PW5 Veena Devi) and Nana PW6 Krishan Gopal, to whom she narrated the incident within minutes of its occurrence, as also by the fact that her vagina was bleeding and the blood had soiled her Pajami Ext.P1.

Learned counsel for the respondent placing reliance upon the following judgments of the Hon'ble Supreme Court, has urged that the trial court having appreciated the evidence and acquitted the respondent, this court should not upset the findings of acquittal simply for the reasons that two views are possible:-

1. **Labh Singh and others** v. **State of Punjab [AIR 1976 Supreme Court 83]**
2. Madan Lal v. State of Jammu and Kashmir [1997(4) RCR (Criminal) 89; and
3. State of Uttar Pradesh v. Nahar Singh (dead) [1998(1) RCR (Criminal) 867.

The precedents relied upon have no application to the facts of this case, because as discussed hereinabove, the view taken by the learned trial court is perverse and is not possible from the evidence on record and one and only one view is formable from the evidence on record and the same is that the respondent committed the offence of rape.

For the foregoing reasons, we accept the appeal, set aside the judgment of acquittal recorded by the trial court, and hold the respondent guilty of the offence under Section 376 of the Indian Penal Code and convict him of the offence. He be taken into custody immediately and produced in the court on **27th November, 2007**, for being heard on the question of quantum of sentence.

(Surjit Singh)
Judge

November 6, 2007.
(Pds)

(Surinder Singh)
Judge.